United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-2573

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against- 74-2573

RAUL CASTELLANO and
GILBERT FERNANDEZ,

Defendants-Appellants.

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Joint BRIEF/Appendix FOR THE DEFENDANTS-APPELLANTS

Attorney for Defendant-Appellant
Castellano:

STUART R. SHAW, ESQ.
600 Madison Avenue (23rd floor)
New York, New York 10022
Telephone: (212) 755-5645

Attorney for Defendant-Appellant
Fernandez:

ALAN J. HIRSHMAN, ESQ.
32 Court Street
Brooklyn, New York 11201
Telephone: (212) UL5-5066

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PRELIMINARY STATEMENT

Defendants-Appellants Raul Castellano and Gilberto Fernandez Appeal from a Judgement of Conviction entered against them on September 18, 1974 in the United States District Court for the Eastern District of New York before the Honorable Jacob Mishler, United States District Judge, and a jury.

Defendants-Appellants Castellano and Fernandez were charged by Indictment No. 74 Cr. 48, a sealed indictment which was unsealed on February 20, 1974. Said indictment charged Defendants-Appellants Castellano and Fernandez with conspiracy to import, receive, conceal, buy, sell and facilitate the transportation, concealment and sale of heroin in violation of Sections 173 and 174 of Title 21, United States Code. Defendants-Appellants have been released on bail, pending appeal, by order of the trial court, Honorable Jacob Mishler.

STATEMENT OF FACTS

A. The Prosecution's Case

Mr. Seguno Coronel, "the brains" of a New York heroin distribution organization (T-313), admitted earning well over $500,000 selling heroin (T-308). Mr. Coronel testified that he sold heroin from April, 1968 (T-118) until November, 1970 (T-242).

Coronel testified that he met Castellano in Puerto Rico in 1963 and Fernandez in Venezuela in 1961 (T-73, 74). Mr. Coronel testified that he met with Manuel Noa in April, 1968 and discussed initiating a business in heroin (T-88, 89, 90).

Mr. Coronel testified that he saw Mr. Castellano by chance in Manhattan in July, 1968 (T-133). Coronel stated that at the time of this meeting, he asked Castellano to work for him in the heroin business (T-134). Coronel testified that he gave one kilo of heroin to Castellano in August, 1968 (T-139) and two kilos in September, 1968 (T-183, 184).

Coronel stated that in January, 1969 there was a shipment of thirty kilos of heroin that was hidden in a "trap" behind the wall in Mr. Noa's apartment (T-198). Coronel further testified that two kilos of heroin went to Castellano in January, 1969 (T-199) and that Noa was instructed to give five kilos to Castellano in December, 1969 (T-234).

Coronel testified that he saw Mr. Fernandez bring money to Noa at Noa's apartment many times in 1969 (T-224). Coronel admitted that he fled from the United States in 1970 and lived in several Caribbean countries. He was arrested in Costa Rica at the end of 1970 on suspicion of being a large heroin dealer

and possession of marijuana. He was brought back to the United States and arraigned in Florida (T-243). Coronel stated that only after conviction for narcotics conspiracy, did he decide to cooperate with the Federal Government (T-244). Coronel had not been sentenced on his narcotics conviction at the time he testified at the trial below (T-245).

Manuel Noa testified that he sold heroin for Coronel and other suppliers from June, 1968 (T-805) to November, 1970 (T-954, 955, 956). Noa stated that he met Mr. Fernandez in 1958 and Mr. Castellano in June, 1969 (T-802).

Noa stated that Fernandez bought lactose and quinine that Noa later used to cut heroin (T-807). Noa also testified that Fernandez helped build a trap in Noa's apartment to hide heroin (T-809), 814). Noa testified that Mr. Fernandez accompanied him to the airport in June, 1969 to pick up a shipment of heroin (T-818, 819). Noa testified that Mr. Fernandez was present during deliveries of heroin (T-821, 829, 830, 834, 840, 859-860, 879). Noa stated that Fernandez helped count and test the heroin (T-863) and guarded the heroin (T-865).

Noa testified that deliveries of heroin were made to Castellano during the course of the alleged conspiracy (T-834, 852, 876-877). Mr. Noa admitted that he was arrested in Florida convicted of violations of the narcotics laws, and sentenced (T-957). Noa started to cooperate with the Federal Government o February 8, 1973 (T-958) after his conviction on four counts and while serving time in Lewisberg Penitentiary on a 17-year senten

Noa further testified that he was acquainted with two men who both had the name of Castellano (T-1274, 1275). During an interview with Government Agent Levine on February 13, 1973, Noa stated that a heroin delivery was made to a man known as Castellano el Fu (T-1273). Noa further testified that he did not know that the first name of Defendant-Appellant Castellano was Rogelio (T-1276, 1277).

Roberto Arenas testified that he was in charge of receiving money from heroin transactions when Mr. Coronel was not available (T-1796, 1797, 1798). Arenas testified that Mr. Fernandez accompanied Noa during a money delivery in December, 1968 (T-1798). Arenas testified that Mr. Fernandez delivered money eight or ten times from January, 1969 to April, 1969 (T-1804). Arenas testified that he received money from Castellano twice between January, 1969 and April, 1969 (T-1803). Arenas testified that he received money from Castellano and Fernandez at other times (T-1808, 1911-1912, 1921-1922).

Mr. Arenas admitted that he was arrested for narcotics conspiracy on March 6, 1973. After being convicted, Arenas decided to cooperate "since they (the Government) had registered another indictment." Arenas also admitted that he was arrested for income tax violations (T-1926, 1927, 1928). Mr. Arenas testified that he was facing a five to twenty year sentence. Arenas was told that "a recommendation letter to the Judge" would be written in return for cooperation at the trial below (T-1930, 1931).

Hilda Herrera, a native of Cuba (T-2526), testified that she knew Defendants-Appellants Castellano and Fernandez (T-2527, 2528). Ms. Herrera testified that she owned a store that sold religious articles (T-2528,2529). Ms. Herrera testified that she saw Mr. Castellano with Mr. Coronel at the store in 1968 (T-2529). She stated that Castellano was in the store with Arenas in 1968 or 1969 (T-2531, 2532). Ms. Herrera testified that she saw Mr. Fernandez and Mr. Arenas in the store at the end of 1968 or beginning of 1969 (T-2533). Ms. Herrera admitted that the Internal Revenue Service was investigating her activities concerning certain charitable contributions (T-2533, 2534).

Rebuttal

Ramiro Gonzalez admitted to being convicted of illegally possessing a gun in Puerto Rico in 1968 (T-2672). He also admitted to being convicted of narcotics violations (T-2673) and sentenced to ten years in prison, which was later reduced six years (T-2675).

Gonzalez testified that he met Toy-Toy in April or May, 1970 in Manhattan (T-2704). Gonzalez testified that Toy-Toy was present at Noa's apartment when a cocaine deal was discussed (T-2714) and that Toy-Toy did deliver three kilos of cocaine (T-2715).

Noa was recalled by the prosecution on rebuttal. Mr. Noa testified that he lived at 346 West 49th Street during part of 1970 (T-2871).

STATEMENT OF FACTS

B. Defendant-Appellant Castellano's Case

Defense Counsel contended throughout the trial that an individual known as Castellano el Fu (the Bad) was involved in illegal narcotics traffic, and than an intentional or accidental mistake of identities caused the Defendant-Appellant, known as Castellano el Bueno (the Good), to be indicted.

Juan Oreste Sanchez testified that he had known Defendant-Appellant Castellano since 1965 (T-2198). Mr. Sanchez testified that he and Defendant-Appellant were business partners in a cafeteria in Puerto Rico from December, 1968 (T-2199) to April, 1969 (T-2201).

Mr. Sanchez testified that Defendant-Appellant was not Castellano el Fu, but was known as Castellano el Bueno (T-2199 to T-2200). Mr. Sanchez stated that Castellano el Fu resembled Defendant-Appellant, but was thinner and had wavy hair (T-2200).

Mr. Sanchez testified that after April, 1969, he saw Defendant-Appellant on various occasions. Sanchez testified that during all that time he never heard or obtained any knowledge that Castellano was involved in illegal activities (T-2201). Mr. Sanchez stated on cross-examination that Defendant-Appellant was at the cafeteria in Puerto Rico for six days a week from September, 1968 to April, 1969 (T-2203).

Defendant-Appellant Rogelio Castellano took the witness stand in his own defense and testified that he had been living in

Puerto Rico for two years prior to the trial, and that he was married with three children. He stated that he earned a livelihood by cutting sugar cand and making a sugar cane juice called guarapo (T-2213 to T-2214).

Defendant-Appellant testified that he was never known by the name Raul Castellano, despite the fact that the indictment charged one Raul Castellano with conspiracy. Defendant-Appellant testified that since 1965 he had known of one Guillermo Castellano-Ceja, whose nickname was el Fu (T-2215 to T-2216).

Defendant's Exhibit I was a certified copy of an indictment in the case of United States v. Guillermo Castellano-Ceja, dated June 25, 1970. Said indictment charged violations of law in regard to illegal dealings in heroin. A certified copy of a guilty verdict and prison sentence in that case was also part of Defendant's Exhibit I (T-2219 to T-2220).

Defendant-Appellant testified that he met the prosecution witness, Segundo Coronel, in 1965 in Puerto Rico (T-2223). Defendant-Appellant testified that he bought a car from Mr. Coronel at the end of 1966. Castellano stated that the car had a bad transmission and it was returned to Mr. Coronel to be fixed (T-2224). When Defendant-Appellant attempted to pick up the car, he found Mr. Coronel's business closed and the car gone (T-2225).

Defendant-Appellant testified that he was in the United States from July to September, 1968 (T-2244) and during this time, he met Mr. Coronel in Manhattan by coincidence, and they argued vehemently about the aforementioned car transaction (T-2226).

Defendant-Appellant testified that he never met the prosecution witnesses, Manuel Noa and Roberto Arenas, prior to the trial (T-2227). He further testified that he never saw Mr. Coronel after the aforementioned argument, and he was never involved in the purchase or trafficking of heroin (T-2227).

Defendant-Appellant Castellano testified that he came to the United States in 1966 for a vacation, and that during this time he was arrested and pled guilty to playing cards for money on Fulton Avenue (T-2229 to 2231). Defendant-Appellant testified that he did not know any of the co-defendants in this case (T-2231 to 2232).

Defendant-Appellant further testified that he also came to New York at the end of 1969 or the beginning of 1970 to buy a frankfurter card and parts for a machine. During this trip, he stayed at the Hotel Bryant on 54th Street and Broadway (T-2235).

James Sarno, a private investigator with twenty years' experience (T-2269, was called by Defendant Castellano to contradict a statement in the prosecution's case-in-chief. Mr. Sarno testified that the apartments at 67 West 69th Street do not interconnect with the apartments at 201-203 Columbus Avenue (T-2271 to 2272). It was at these addresses that Jordan J. Stevens, a private investigator with fourteen years' experience (T-2438), testified that he went to with a picture of Castellano which nobody recognized (T-2442). The proprietor of the Red Baron Restaurant at 67 West 69th Street did not recognize Defendant Castellano's picture (T-2446 to T-2447).

C. Defendant-Appellant Fernandez' Case

Gilberto Fernandez testified that he was born in Cuba and has been known by the nickname Toy-Toy since early childhood (T-2273). Mr. Fernandez stated that in 1958, he moved from Cuba to Venezuela where he worked in a restaurant for about three years (T-2274 to T-2276). During this time, he met Manuel Noa (T-2276).

Defendant-Appellant Fernandez testified that he came to the United States from Venezuela in 1961, bringing approximately $5,000 that he had saved (T-2276. At this time, Mr. Fernandez moved into an apartment on 38th Street in Manhattan with his common-law wife and their daughter (T-2277). Fernandez stated that he worked at Horn & Hardart on 42nd Street for about five years, working his way up to Assistant Manager (T-2278, 2279).

Mr. Fernandez testified that he never met co-defendant Castellano before the trial (T-2278, 2279). Mr. Noa and his family moved into the same building on 38th Street, and the Noa family and Fernandez family socialized with each other (T-2280, to 2281). Mr. Fernandez testified that his mother-in-law came from Venezuela, requiring the whole family to move to a three-bedroom apartment at 639 10th Avenue (T-2282, 2279).

After his job at Horn & Hardart, Mr. Fernandez stated that he worked at the Bronx Terminal Market, delivering and loading fruit (T-2283). After a year, Mr. Fernandez became a waiter at The Harvard Club on 45th Street and Sixth Avenue, and worked at this position up to the trial (T-2283, 2284).

Mr. Fernandez testified that his family kept in touch with the Noa family (T-2285). It was stated that Noa moved to Miami around 1966 (T-2285), then moved to an apartment on West 49th Street in Manhattan in 1967 or 1968 (T-2286).

Mr. Fernandez testified that after he was arrested in March 1974, he discovered that the allegations against him concerned acts dating back over five years, and it was impossible to remember (T-2287 to T-2291).

Mr. Fernandez testified that he never made payments for heroin to Mr. Arenas in December, 1968 (T-2291). He stated that he was in Florida in December, 1968 (T-2294). Fernandez also testified that he never built a trap (to hide heroin) in Noa's apartment (T-2296).

Mr. Fernandez stated that, with the financial help of his wife and mother-in-law, he bought a Toyota on December 30, 1968 (T-2297, 2298, 2301).

Fernandez testified that Noa's daughter was infatuated with him, but he ignored her flirtations (T-2302 to 2304, 2309, 2320). These flirtations caused tension between the Noa family and Fernandez family (T-2321). Mr. Fernandez did not remember seeing Noa after May, 1969 (T-2323).

Mr. Fernandez testified that he met Mr. Coronel and Mr. Arenas a few times (T-2324, 2325). Mr. Fernandez also stated that he never went to the airport with Noa or received any money from Noa (T-2326, 2390). Mr. Fernandez has never been convicted of a crime (T-2326).

Sara Diaz, niece of Gilberto Fernandez (T-2405), testified that she came from Mexico to Florida in December, 1968 and met Mr. Fernandez and his family (T-2405). Ms. Diaz also stated that she lived with Mr. Fernandez and his family in New York City after her stay in Florida (T-2407, 2409).

Esperanza Monsanto testified that she had been living with Gilberto Fernandez for about sixteen years and had one daughter living with them (T-2412). Ms. Monsanto stated that she came to the United States in 1961, and has worked as a dancer and manicurist, earning about $2,000 per year (T-2412, 2413). She brought about $3,000 when she came to the United States and hid it at home (T-2415).

Ms. Monsanto testified that her mother, Esperanza Vergara, came from Venezuela, bringing about $6,000 to this country (T-2416, 2417). (See Defendant Fernandez' Exhibit CC) Ms. Monsanto stated that her mother lent $4,000 to Gilberto Fernandez to buy a house (T-2418).

Ms. Monsanto corroborated the testimony of Mr. Fernandez concerning the trip to Florida in December, 1968 (T-2418, 2419) and the problems Mr. Fernandez had with Mr. Noa's daughter (T-2425, 2426). Ms. Monsanto testified that Gilberto Fernandez did not deal heroin (T-2422, 2422A) or have large sums of money (T-2423).

Ms. Monsanto testified that she was given the keys to Noa's apartment on West 49th Street in May, 1969 and gave the keys to Jose Cabezas (T-2427, 2428).

Ms. Monsanto went to Madrid with Mr. Fernandez in October, 1969 (T-2429). Ms. Monsanto further testified that she and her mother lent money to Mr. Fernandez to buy the Toyota (T-2430, 2433).

Marino Pena, a High Priest of the Orumila Church of New York (T-2474), testified that he has known Gilberto Fernandez since 1966 (T-2475). Mr. Pena testified that Gilberto Fernandez has a good reputation for honesty (T-2485). Mr. Pena further stated that he has known Mr. Arenas since the beginning of 1968 (T-2476), and that Mr. Arenas has a bad reputation for honesty and truthfulness (T-2483, 2485).

Jose Cabezas, a coffeeman (-2570), testifed that he has been living in apartment 2RW at 346 West 49th Street from approximatley July, 1969 (T-2572) (this is the apartment that Manuel Noa testified that he used as a headquarters for dealing heroin) until March, 1970. Mr. Cabezas stated that Ms. Monsanto gave him the keys to the apartment around July and that he paid the expenses since then (T-2570). Mr. Cabezas further testified that he never saw Mr. Noa (T-2577) since moving into the apartment.

Mr. Fernandez was recalled to the witness stand towards the end of the trial and testified that he did not know the rebuttal witness, Ramiro Gonzalez (T-2914).

POINT I

THE PRE-INDICTMENT DELAY IN EXCESS OF FOUR YEARS FROM THE TIME OF THE ALLEGED CRIMINAL ACTS TO TRIAL RESULTED IN SEVERE PREJUDICE TO DEFENDANTS-APPELLANTS' CASE DEPRIVING APPELLANTS OF THEIR FIFTH AMENDMENT RIGHTS OF DUE PROCESS GUARANTEED BY THE UNITED STATES GOVERNMENT.

The sealed indictment of Defendants-Appellants Castellano and Fernandez for conspiracy was opened on February 20, 1974 (Appendix Page , hereinafter referred to as A-, followed by the page number). The alleged conspiracy occurred between January 1, 1968 and December 31, 1970 (A-). This pre-indictment delay of over four years resulted in Defendants-Appellants being hindered in preparing their defense. For instance: alibi witnesses were not able to be called because their memories of the Defendants-Appellants in regard to their whereabouts at crucial times during the course of the alleged conspiracy were severely impaired.

The memories of prosecution witnesses suffered also. A key prosecution witness, Coronel, an informant, admitted directing this conspiracy, but stated his memory was severely impaired.

This prejudice, caused by the extreme pre-indictment delay of four years, deprived Defendants-Appellants of their rights under the due process clause of the Fifth Amendment.

It is well-settled that pre-indictment delay can amount to a denial of due process if sufficient prejudice is shown. United States v. Marion, 404 U.S. 307, 323-324 (1971);

United States v. Feinberg, 383 F.2d 60, 65 (2nd Cir., 1967); cert. denied, 389 U.S. 1044 (1968); Ross v. United States, 349 F.2d 210, 215-216 (D.C. Cir., 1967).

There is no presumption of prejudice that attaches to a lengthy pre-indictment delay. United States v. Parrot, 425 F.2d 972, 976 (2nd Cir., 1970), cert. denied, 400 U.S. 824 (1971); United States v. Feinberg, supra.

Defendants-Appellants argue, however, that:

> Pre-arrest delay may impair the capacity of the accused to prepare his defense, and, if so, such impairment may raise a due process claim under the Fifth Amendment. United States v. Feinberg, supra, at 65.

The Supreme Court has ruled that the circumstances of each case must be analyzed to determine whether the requisite degree of prejudice has been shown. United States v. Marion, supra, at 325; United States v. Ianelli, 461 F.2d 483, 485 (2nd Cir., 1972); cert. denied, 409 U.S. 980 (1972). Defendants-Appellants do not have the burden of proving prejudice "beyond a reasonable doubt, or even by a preponderance of the evidence." Jackson v. United States, 351 F.2d 821, 823 (D.C. Cir., 1965).

On repeated occasions, Defendant-Appellant Fernandez could not recall crucial events and circumstances necessary to establish his defense. This failure to recall because of the over four year time lag was clearly evident when Fernandez took the stand and testified on direct (T-2280, 2286, 2287, 2290, 2295, 2322, 2323). Fernandez was similarly burdened and hindered during cross-examination (T-2334, 2335, 2364). The following are examples of Defendant-Appellant Fernandez' inability to recon-

struct events on direct examination because of the pre-indictment delay:

> Q: Do you remember approximately what year Mr. Noa moved to Miami?
> A: No, I am not sure. It would have been in 1966, but I am not sure.
> Q: Do you have trouble recalling those dates, sir?
> A: Yes.
>
> (T-2285)

And again:

> Q: When you found out the period of time that you were charged with committing crimes, did you make an attempt to find out where you may have been during some portions of those years, 1968 and 1969?
> A: Yes, sir.
> Q: Did you have any difficulty in trying to find out about this period of time?
> A: Of course. It was many years ago.
> Q: Could you remember what happened in 1968- in June?
> A: No, sir.
> Q: Couldn't you remember what happened or where you were in some portion of July, 1968?
> A: No, it's impossible. There is nothing that I could recall.

Fernandez' inability to recall was clearly brought on by the pre-indictment delay. The circumstances of this case caused the pre-indictment to be severely prejudicial to Defendants. Mr. Fernandez is a man of minimal educational background who could not understand English very well (T-2273). Fernandez speaks Spanish. He came to the United States to seek asylum after escaping from Cuba. He earned his living here as a waiter and delivery man (T-2283, 2284). Manuel Noa, a convicted felon, was the principal prosecution witness who testified against Mr. Fernandez. Noa testified that Fernandez was involved in various activities during certain months of the alleged conspiracy (T-804 to 805, T-806 to807, 818, 830, 862). Mr. Fernandez' wife also

had difficulty remembering events (T-2429, 2430).

Defendant-Appellant Fernandez argues that the jury erroneously inferred that he was being purposefully evasive and/or that he had something to hide. It should be noted that prejudice may arise:

> If the defendant is unable credibly to reconstruct the events of the day of the offense. United States v. Feinberg, supra, at 65.

Defendant-Appellant Castellano similarly was prejudiced for the aforementioned reasons. Mr. Coronel, a key prosecution witness, who admitted directing the conspiracy (T-313) and to being convicted for his involvement in narcotics (T-244), but not yet having been sentenced (T-245), testified against Mr. Castellano. Coronel alleged that he directed Mr. Noa to deliver five kilos of heroin to Mr. Castellano in December, 1969 (T-234). Castellano testified on his defense that he could not remember whether he flew to New York at the end of 1969 or the beginning of 1970 (T-2262, 2235). It should be noted that Mr. Castellano was unable to understand English, as was Mr. Fernandez, and testified through an interpreter. Castellano, as Fernandez, had little education. Castellano was also a Cuban refugee who had fled from Castro's Cuba. Spanish is his first language. He lived predominantly in Puerto Rico after his flight from Cuba.

Defense Counsel demonstarted at the trial below that Defendant-Appellant Castellano was known as Castellano el Bueno (T-2199, 2200). It was further shown that Defendant-Appellant was never known as Raul, which was the name in the indictment (T-2215, 2216). Defense Exhibit I proved that another man known

Castellano el Fu was convicted and sentenced for illegal activities involving heroin (T-2219, 2220). Defense witness, Sanchez, testified that Castellano el Fu resembled Defendant-Appellant (T-2200). It is reasonable to infer that the extreme pre-indictment delay tainted the identification of Defendant-Appellant Castellano.

Defendants-Appellants argue that the case at bar is readily distinguisable from other cases where the same point of pre-indictment delay was raised unsuccessfully on appeal. In United States v. DeMasi, 445 F.2d 251, 255 (2nd Cir., 1971); cert. denied, 404 U.S. 882 (1971) and United States v. Giacalone, 477 F.2d 1273, 1276 (6th Cir., 1973), Appellants failed to offer proof of prejudice. Appellants herein argue that they have illustrated, by means of this brief, the clear prejudice to their defense caused by the four year delay in prosecution.

In United States v. Quinn, 445 F.2d 940 (2nd Cir., 1971); cert. denied, 404 U.S. 850 (1971) Appellants relied principally on the fact that three witnesses died before trial. However, the asserted testimony of these witnesses was deemed to be of "quasi-nebulous relevance." Id., at 943.

In United States v. Scully, 415 F.2d 680 (2nd Cir., 1969), Defendant-Appellant was charged with having committed one robbery which is clearly in apposite to the instant case which allegedly involved a far-flung conspiracy of many parties over several years. Scully was interviewed by a special agent and the police concerning the charge. The court held that "...the date and time of the robbery was firmly fixed in Scully's mind." by said inter-

view. Id., at 683

In United States v. Capaldo, 402 F.2d. 821 (2nd Cir., 1968); cert. denied, 394 U.S. 989 (1969) is another case where a Defendant-Appellant was charged with only one robbery. The pre-indictment delay in Capaldo did not justify reversal because he was able to give "...a coherent account of his version of the events on the day of the robbery" and disinterested witnesses testified against him. Id., at 823.

In United States v. Parrot, supra., memory impairment was claimed due to pre-indictment delay, but the impairment was considered "selective" and "...the Governement case was strongly based on documentary proof." Id., at 976.

In the case at bar, multiple violations spreading over a two-year period were charged against Defendants-Appellants. The key evidence against Defendants-Appellants came from Government informants, or "interested witnesses." Said informants, Coronel, Noa, Arenas, were admitted drug dealers of major import. Defendants-Appellants further argue that the inability of Defendants-Appellants to reconstruct past events was directly caused by the pre-indictment delay. Mr. Castellano and Mr. Fernandez argue that for all the above reasons, they were severely prejudiced, and denied their rights under the due process clause of the Fifth Amendment.

POINT II

THE TRIAL JUDGE ABUSED HIS DISCRETION AND SERIOUSLY PREJUDICED THE CASE OF DEFENDANT-APPELLANT FERNANDEZ WHEN TESTIMONY OF AN ALLEGED PRIOR SIMILAR CRIME WAS ERRONEOUSLY ADMITTED ON THE PROSECUTION'S REBUTTAL.

Ramiro Gonzalez, a convicted felon and informer (T-2672, 2673, 2675), testified, over defense counsel's objection (T-2705, 2706). Gonzalez testified that Defendant-Appellant Fernandez was present during a discussion of a cocaine deal (T-2714); specifically that Mr. Fernandez allegedly delivered three kilos of cocaine (T-2715) in April or May, 1970 (T-2704). Said rebuttal testimony was improper because said alleged delivery of cocaine did not result in an arrest and/or a conviction, United States v. Glasser, 443 F.2d 994, 1003 (2nd Cir., 1971); cert. denied, 404 U.S. 854 (1972). Appellant Fernandez argues further that said testimony permitted the jury to draw unwarranted inferences, fostered hostility towards the Defendant Fernandez, and created such extreme prejudice against Mr. Fernandez as to far outweigh any possible probative value that could be attached to said evidence. United States v. DeCicco, 435 F.2d 478, 484 (2nd Cir., 1970), United States v. Deaton, 381 F.2d 114, 117 (2nd Cir., 1967).

The decision of a trial judge to admit into evidence prior similar crimes of a Defendant must be based on a proper balancing test.

> The problem is not merely one of pigeon-holing, but one of balancing, on the one side, the actual need for the other-crimes-evidence in the light of the issues and the other evidence available to the prosecution, the convincingness of the evidence that the other crimes were committed and that the accused was the actor, and the strength or weakness of the other-crimes-evidence in supporting the issue, and on the other the degree to which the jury will probably be roused by the evidence to over-mastering hostility. United States v. Bozza, 365 F.2d 206, 213-214 (2nd Cir., 1966) quoting from McCormick, Evidence §157, at 332 (1954).

The prosecution's case-in chief primarily consisted of the testimony of four witnesses: Coronez, Noa, Arenas, and Herrera. Each of the aforementioned witnesses admitted to their personal involvement in the conspiracy, and each of these witnesses identified Defendant-Appellant Fernandez. Coronez testified that Defendant-Appellant Fernandez was involved in the alleged conspiracy (T-178, 179, 180). Noa testified that Mr. Fernandez assisted in the distribution of heroin in various ways (e.g. T-805, 807, 809, 814). Arenas testified that Defendant-Appellant Fernandez delivered money on various occasions during the course of the alleged conspiracy (T-1804). It is patently obvious that the rebuttal testimony of Ramiro Gonzalez was merely ". . . thrown on scales already heavily tipped against the defendant . . ." and was completely unnecessary "to bolster" the testimony of the aforementioned prosecution witnesses. United States v. Bradwell, 388 F.2d 619, 622 (2nd Cir., 1968); cert. denied 393 U.S. 843 (1968).

The sole issue that was relevant regarding Defendant-Appellant Fernandez involved his participation in an alleged heroin conspiracy from the beginning of 1968 to the end of 1970. It should be noted that the last mention of Mr. Fernandez' alleged involvement in the conspiracy was Noa's testimony in regard to an alleged February, 1970 transaction (T-946). It should be noted that Noa testified at his own previous trial in the Southern District of New York in October, 1973. Defendant Fernandez was never mentioned in regards to the February, 1970 transaction (T-1290, 1296) in said previous trial of Noa. The testimony of the prosecution's rebuttal witness, Ramiro Gonzalez, concerned Mr. Fernandez' involvement in an alleged subsequent cocaine transaction in April or May, 1970, which was obviously irrelevant to the issue in the instant case, an indictment for heroin. Considering the amount of testimony already against Mr. Fernandez, the only real purpose of the rebuttal testimony was to show Defendant-Appellant's criminal character or disposition, which was clearly improper. Boyd v. United States, 142 U.S. 450 (1892); See Michelson v. U.S., 335 U.S. 469 (1948); United States v. James, 208 F.2d 124 (2nd Cir., 1953), 1 Wigmore, evidence § 194 (3rd Edition, 1940).

The evidence of this other alleged crime was unconvincing by any standards. It came from the lips of Noa, a man who was serving 17 years in prison at the time of trial for narcotics violations, and was hoping to get consideration from the trial judge for his testimony (T-2673, 2675). Mr. Fernandez testified

on cross-examination that he did not know Ramiro Gonzalez (T-2365).

On the other side of the balancing formula is the prejudice suffered by Mr. Fernandez in the eyes of the jury. It is more than probable that the jury drew the unwarranted inference from the rebuttal testimony that Defendant-Appellant Fernandez was a man of criminal character, and therefore, committed the crime charged in the indictment.

Appellant Fernandez argues that his case at trial in the District Court was similar to United States v. DeCicco, supra, at 484. The defense's only hope on trial was to attack the credibility of the prosecution's witnesses

> And thereby to raise a reasonable doubt about the veracity of [their] account[s] of what the defendant did or said. Id.

Although a cautionary instruction was given to the jury, it could not cure "the prejudice engendered by the admission into evidence " Id. at 483, of the alleged subsequent crime against Fernandez. Defendant-Appellant Fernandez argues that any legitimate probative value that could be attached to the rebuttal testimony "was far outweighed by the unwarranted inference the jury was permitted to draw . . ." Id. at 484; See United States v. Byrd, 352 F.2d 570 (2nd Cir., 1965); United States v. Fierson, 419 F.2d 1020 (7th Cir., 1969).

It is further argued that said rebuttal testimony was erroneously admitted based on the trial court's misunderstanding of prior testimony of Defendant-Appellant Fernandez. No testimony was given concerning Ramiro Gonzalez or cocaine on direct examination by the defense. On cross-examination, the prosecutor

asked:

Q: Do you know a man by the name of Ramiro Gonzalez?

A: No sir. (T-2365)

On recross by the prosecution, the following occurred:

Q: I show you Government's Exhibit 36 for identification (photograph of Ramiro Gonzalez) and I ask you if you have ever seen that individual.

A: No sir.

Q: You never delivered cocaine to that man?

A: No, I don't know him.

Mr. Hirshman: Your Honor, I want to note my objection to the question even though it has been answered. I think it is an improper question.

The Court: I am allowing it only because it is already in the record. The question was asked before and answered.

Mr. Hirshman: The first time answered by my client?

The Court: My recollection is that the very same question was asked. It may have been of a different individual.

Mr. DePetris: This morning I asked that specific question of this witness and he answered no, as to a Mr. Gonzalez.

Mr. Hirshman: This morning?

The Court: Yes.

Mr. Hirshman: I must have been sleeping.

The Court: That is the only reason I allowed it. (T-2397, 2398)

Defendant-Appellant submits that this testimony was erroneously admitted. It appears that the trial court ruled on

the mistaken assertion of the prosecutor that the "specific question" was previously asked of Mr. Fernandez. The record reflects that Mr. Fernandez answered "no" concerning whether he knew Ramiro Gonzalez.

It is respectfully submitted that both the judge and the prosecutor used this erroneously admitted testimony of Mr. Fernandez to justify admitting the rebuttal testimony:

> THE COURT: Of course. I wanted to know whether you found anything.
>
> MR. DE PETRIS: Mr. Hirschman is not here. I was unable to locate in the testimony other than the specific occasion when I asked the first time about the cocaine and the answer was given and the second time there was an objection. I believe your Honor turned to Mr. Hirschman and Mr. Hirschman got up and objected, as I recall.
>
> THE COURT: Page 2397.
>
> (T-2640, Lines 9 through 17)

And, again:

> Mind you, there is another reason, Mr. Hirschman. I didn't have the benefit of 2397. The question was: "You never delivered cocaine to that man," and the answer was, "No, I don't know him." You went beyond that. Why shouldn't the Government be able to say he knows him.
>
> MR. HIRSCHMAN: That is different --
>
> THE COURT: "I don't know him."

MR. HIRSCHMAN: 2397?

THE COURT: Yes.

MR. HIRSCHMAN: I can understand asking him if he knows him. I still don't quite follow the Court's remarks with regard to what you said -- where does cocaine fit into the conspiracy?

THE COURT: It is narcotics.

MR. HIRSCHMAN: We never raised the question of narcotics. Your Honor said yesterday --

THE COURT: Aside from these answers, aside from the answers, in United States against DiChico, 435 F 2nd 478, Second Circuit 1970, there the defendant was charged with transporting stolen goods in interstate commerce. The Government introduced -- and the stolen merchandise was works of art -- the Government introduced evidence that the defendant offered for sale -- which is a different crime -- offered for sale two stolen works of art. The similarity of the crimes wasn't even discussed.

MR. HIRSCHMAN: That is because what is similar were the works of art.

THE COURT: That is right. The subject matter. The type of crime. In other words, what the Government is saying here is that your man was

in the business of dealing in --

MR. HIRSCHMAN: That we was --

THE COURT: Wait. That he was dealing in heroin and narcotic drugs. I don't find that a sale of cocaine is dissimilar. I am not saying the same crime, I am saying similar crimes. He was in the business of selling another narcotic drug.

A man is in the grocery business, he also sells vegetables. He is in the grocery business. The charge here is the defendants are in the narcotics business. The charge is heroin, a narcotic drug. There the charge would be cocaine, a narcotic drug. Whether the charge is sale or conspiracy, to me matters little because part of the narcotics business is sales. I might say this, the mere fact that the testimony is sale doesn't mean the underlying charge couldn't be drawn on conspiracy. I can't conceive of a heroin transaction committed alone. There has to be an importer, wholesaler, distributor, retailer, and final purchaser.

MR. HIRSCHMAN: Your Honor, that is not the of cocaine. What the similarity is you are talking about is something that happened in 1970. The majority -- all the testimony about Gilberto Fernandez is '68 and '69. It is one alleged isolated sale of cocaine.

That is a sale. I know your Honor doesn't think there is a difference between a three-year conspiracy and one isolated sale in 1970 --

THE COURT: I know the difference. But there are similarities. This isn't cocaine for a quarter of an ounce. It shows that he is a dealer. It is a three-kilogram sale.

MR. HIRSCHMAN: You heard the testimony, you sat in the court. Gilberto Fernandez is the only man who never came in contact with heroin. He took money, delivered money. That was the claim. Now all of a sudden he became a dealer.

THE COURT: Wait a minute. Is he in the narcotics business?

MR. HIRSCHMAN: That is the allegation.

THE COURT: I don't think that in order to show that the crimes were similar that they have to show the identical roles in the business.

MR. HIRSCHMAN: I am saying that the drug is different, the crime is different. The action of the person is different. Where is the similarity?

THE COURT: I think all you show is it is not identical.

MR. HIRSCHMAN: On three different levels?

THE COURT: Now, I will show you how it is

similar. It is a narcotic. It is a dealer in narcotics.

MR. HIRSCHMAN: Where is the similarity there?

THE COURT: Three kilograms.

MR. HIRSCHMAN: What is the similarity?

THE COURT: The conspiracy dealt in large quantities. I say, if the charge here was that the sale was an eighth of a kilo, four ounces, to determine he was a user, that is a dissimilarity. But it shows he was in the narcotics business and he was in possession of it as a seller. For all I know he may have been delivering it for somebody else. I don't know all the facts. Let's assume all the Government shows is he was there just for the purpose of getting paid for the narcotics. He was nevertheless in the business. The role in one case was to sell and deliver the cocaine. The other case was to collect the money. And to run errands for Noa. I don't know whether the testimony was on one or two occasions he accompanied Mr. Noa when he was delivering narcotics and actually possessing it.

MR. DE PETRIS: That is part of the testimony.

MR. HIRSCHMAN: Part of the testimony was he was a driver. He didn't -- I know what the testimony is.

THE COURT: These arguments demonstrate differences. The rule is not identical crimes, it is similar crimes. Particularly when the testimony -- particularly when the defendant gets on the stand and indicates he has nothing to do with narcotics.

MR. HIRSCHMAN: He never said narcotics.

THE COURT: Except in answer to Mr. DePetris' question and there I said I might have very well considered striking it but the answer is there. Not that "I didn't deal in narcotics," but "I don't even know the man." That is before the jury.

MR. HIRSHMAN: Your Honor, I really find it difficult to understand. Yesterday indicated to me if it was only those two times that the Mr. De Petris asked him and if I objected the first time you would have sustained the objection. If you would have sustained the objection, how would Mr. De Petris be able to bring that man in?

THE COURT: We are beyond that. I said, and I didn't have the transcript until this morning --

MR. HIRSHMAN: I understand.

THE COURT: When I recognize there is more to the answer than the denial that he dealt in narcotics, and denial that he dealt in cocaine, the denial is that the knew Romero Gonzalez.

MR. HIRSHMAN: May I just finish? The government showed Mr. Fernandez an exhibit. Mr. Fernandez said, "No sir, I don't know that man." They can put on Gonzalez to show he knows him. The next question is objected to. Your Honor said that is a proper objection. If there is a proper objection then all you have left is he denied knowing some man. Mr. De Petris has the right to bring the man on and say "Do you know this man?"

I don't understand where the cocaine comes in.

THE COURT: I don't think I have to strike it. I am going to allow it on the grounds that it is a similar act. When he sold three kilos of cocaine or the evidence shows it, or bought from Mr. Romero Gonzales, it is admissible on that theory.

MR. DE PETRIS: His testimony will be that Mr. Gilberto Fernandez delivered three kilos to Romero Gonzales for Mr. Noa.

THE COURT: For Mr. Noa?

MR. DE PETRIS: Yes.

THE COURT: Then I have no problem. None at all. If I didn't have that ground I frankly would be troubled and I would be inclined what I said I would do yesterday. But having that, and in light of the answer, I see no reason to strike it. To me it is clearly admissible now. Clearly admissible as a prior similar act.

(T-2645, line 18 to
T-2652, line 16)

POINT III

CONSIDERING THE CONFLICTING EVIDENCE CONCERNING THE IDENTIFICATION OF DEFENDANT-APPELLANT CASTELLANO, AND THE FACT THAT ANOTHER MAN NAMED CASTELLANO, A CONVICTED NARCOTICS VIOLATOR, RESEMBLED DEFENDANT-APPELLANT, AN IDENTIFICATION HEARING SHOULD BE HELD TO DETERMINE WHETHER AN INNOCENT MAN HAS BEEN CONVICTED ON THE BASIS OF FALSE IDENTIFICATION.

Defendant-Appellant Castellano is known by the nickname "El Bugno," (T-2199, 2200), and his first name is Rogezio (T-2215, 2216). The indictment charged that one Raul Castellano was involved in the heroin conspiracy.

Defense cousel introduced evidence that one Guillermo Castellano-Ceja, whose nickname is "El Fu" was convicted of dealing in heroin (T-2215, 2216, 2219, 2220). A disinterested witness testified that the other Castellano resembled Defendant-Appellant (T-2200).

The prosecution witness, Coronez, testified that Defendant-Appellant's first name was Raul (T-335). Coronez also testified that he was acquainted with both men named Castellano, although he did not know which nickname was attached to Defendant-Appellant (T-336). However, Coronez on cross-examination said Castellanos' nickname was "Castle" (T-756).

Noa testified that he knew both men named Castellano (T-1673, 1674), but insisted that Defendant-Appellant's nickname was "El Fu" (T-1658, 1695). Noa did not know that Defendant-Appellant's real name was Rogezio (T-1276, 1277). Furthermore, during extensive interviews by various government agents, Noa

never mentioned the name Castellano (T-1272, 1276). Noa never mentioned a nickname in regard to Castellano during his Grand Jury testimony on October 19, 1973 (T-1677, 1678).

Coronez decided to cooperate with the federal government after he was convicted of narcotics conspiracy (T-244). Coronez testified that he was waiting to be sentenced by Judge Mishler, who was the Judge at the trial below (T-245). Noa, too, decided to become an informant after he was convicted on violations of the Federal Narcotics Laws (T-957, 958).

Noa and Coronez made in-court identifications while Defendant-Appellant Castellano was sitting at the defense table (T-72, 800). Both Noa and Coronez were working closely with the prosecution, hoping to receive lenient treatment in regard to their sentences.

Roberto Arenas also testified for the prosecution and made an in-court identification of Defendant-Appellant Castellano (T-1803). Mr. Arenas was facing a five to twenty-year sentence for narcotics conspiracy and expected "a recommendation letter from the prosecutor to the judge" in return for cooperation at the trial below (T-1930, 1931).

It is the contention of Defendant-Appellant Castellano that the totality of circumstances surrounding the in-court identification of Castellano, were "so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law," Stovall v. Denno, 388 U.S. 293, 302, 18 L.Ed. 2d 1199, 1206 (1967).

> In cases such as this, where the question of guilt or innocence hangs entirely on the reliability and accuracy of an in-court identification, the identification procedure should be as lacking in inherent suggestiveness as possible. Yet that is often not the case. When asked to point to the robber, an identification witness--particularly if he has some familiarity with courtroom procedure--is quite likely to look immediately at the counsel table, where the defendant is conspicuously seated in relative isolation. Thus the usual physical setting of a trial may itself provide a suggestive setting for an eyewitness identification. United States v. Williams, 436 F.2d 1166, 1168 (9th Cir., 1970); cert. denied, 402 U.S. 912 (1971).

In the trial below, the physical setting of the courtroom was not the only factor that could unduly influence the in-court identification. Defendant-Appellant Castellano argues that the "interested" government witnesses expected leniency in return for their cooperation, and these expectations guided their accusing fingers.

It is respectfully requested that a post-trial identification hearing is necessary to prevent the possible imprisonment of an innocent man. It is further requested that a lineup be conducted that will include Defendant-Appellant Castellano, also known as "El Bueno", and Guillermo Castellano-Ceja, also known as "El Fu."

POINT IV

DEFENDANT-APPELLANT ROGELIO CASTELLANO, INDICTED UNDER THE NAME RAUL CASTELLANO, WAS EFFECTIVELY DENIED HIS SIXTH AMENDMENT RIGHT OF COUNSEL.

Defendant-Appellant Castellano was effectively denied his Sixth Amendment right to counsel despite the fact that his retained attorney, Senator Nicholas Noguerras of Puerto Rico, was an able advocate at the pre-trial removal proceedings in Puerto Rico, and during the approximately four-week trial conducted in the Eastern District of New York. Castellano's attorney, Noguerras, failed to insure that his client received all of his constitutional protections. Specifically, Noguerras failed to file a demand for a Bill of Particulars and a subsequent motion to suppress his client's identification. It is argued that such a motion would have been based on the information provided in the aforementioned undemanded Bill, and would have been successful with the direct result of having had the indictment against his client dismissed.

Defendant-Appellant Castellano's case hinged on the question of his identification. This key issue was obvious to defense counsel because he pursued it throughout the protracted pre-trial preliminary hearing before the Magistrate, and continuously at trial in the Eastern District. However, counsel should have moved to have a hearing before the trial judge which

he failed to do. It is respectfully argued that trial counsel's failure to exercise this option and/or meaningfully advise his client of it resulted in the loss by his client of his Sixth Amendment Rights in reversable error. Calloway v. Powell, 393 F.2d 886 (5th Cir. 1968).

Defendant-Appellant argues this point despite the fact that his attorney was granted a great deal of leeway before the Magistrate in Puerto Rico. Said hearing contained over 49 pages of transcript, almost entirely devoted to the issue of identification. Nor does Defendant-Appellant pray that this Appellate Court not undertake to peruse and review said hearing transcript and note that the issue of identification of Defendant-Appellant was never adequately properly established as proscribed by Title 18, Rule 40(A) as amended April 24, 1972:

> (A) If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment.

Defendant-Appellant respectfully requests that this honorable court study the argument in point of this brief that deals with said hearing.

Defendant-Appellant Castellano argues this point on inadequacy of counsel, and relies in part on Chief Judge Bazelon's opinion in United States v. DeCoster, 487 F.2d 1197 (1973):

> "The effective assistance of counsel is a defendant's most fundamental right 'for it affects his ability to assert any right he may

have.' The Supreme Court has observed, 'if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel.'"

The Court adopted the following standard:

"A defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate."

The Court thereafter reasserted the guidelines set up in Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968) cert. denied 393 U.S. 849:

"Specifically--

(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. Many rights can only be protected by prompt legal action. The Supreme Court has, for example, recognized the attorney's role in protecting the client's privilege against self-incrimination, Miranda v. Arizona, 384 U.S. 436 (1966), and rights at a line-up, United States v. Wade, 388 U.S. 218, 227 (1967). . .

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that 'all available defenses are raised' so that government is put to its proof. This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the government intends to call, when they are accessible. The investigation should always include efforts to secure

> information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research." (footnotes omitted)

Defendant-Appellant argues this point of inadequacy of counsel despite this court's recent decision in United States v. Yanishefsky, 500 F.2d 1327 (1974). It is respectfully argued that the jury trial waiver by defense counsel, had not reported in the decision, but the key issue in that case was a tactic utilized by counsel to benefit his client who had a long history of convictions that might have prejudiced a jury against his client if she took the stand. It is also argued that the trial court in Yanishefsky exonerated trial counsel of any inadequacy at trial, Id. at 1334. It is further argued that Yanishefsky is distinguishable from the instant case on the issue of a waiver of a constitutional right to a hearing. In Yanishefsky, counsel waived a hearing to suppress statements because his client had confessed to an Assistant U.S. Attorney and to an F.B.I. agent after her rights were given, Id. at 1331. In the instant case, identification was always in issue and never admitted by Defendant-Appellant.

Defendant-Appellant submits that the rule set forth in DeCoster, Id. at 1204, 1205, that is proscribed in Yanishefsky, Id. at 1334, in regard to the proposition that a hearing after trial will only be granted if a motion for such a hearing is made to the trial court does not obtain here. Firstly, co-counsel for Fernandez made a post-trial motion for relief and

was denied. (See Appendix docket sheet, District Court.) The trial court had ruled that any motion made would pertain to all defendants. Secondly, the argument is respectfully made that failure to make such a motion is further indication of counsel's ineffectiveness, and in particular to his aforementioned failure in the area of paperwork, specifically the failure to make a post-trial motion.

Defendant-Appellant further argues that Garton v. Swenson, 497 F.2d 1137 (1974) (8th Cir. 1974) cited in Yanishefsky, Id. at 1334 as the controlling rule, permits the requested relief of a post-trial hearing to review the effectiveness of counsel on a collateral issue. In that case, defense counsel's inadequacies at trial was reviewed despite a District Court judge's opinion that such a review would be valueless, Id. at 1139.

Defendant-Appellant relies on the standard set forth in McMann v. Richardson, 397 U.S. 759, 773 (1970), wherein the Supreme Court reasoned that "the right to counsel means the right to effective counsel." It is respectfully argued that in the instant case, the waiver by counsel of his client's right to an identification hearing was a grievious error on his part. It is further argued that despite the fact that counsel was adequate as an advocate at the pre-trial hearing and at trial, that his advocacy fell short because of his weakness on the law and/or paperwork. It is respectfully argued that lawyers in the United States should be held to a higher standard than their brethran

in England whose roles are broken down into Barrister (trial advocate), and Solicitor (legal paperwork, research and the like). Wherefore, Defendant-Appellant argues that his case be reversed and remanded for a new trial and/or for an identification hearing to cure the error below.

POINT V

DID THE MAGISTRATE AT THE PRELIMINARY HEARING IN PUERTO RICO ERR IN REMOVING THE DEFENDANT-APPELLANT CASTELLANO WHEN THE GOVERNMENT ONLY OFFERED PROOF OF IDENTIFICATION BY ONE FEDERAL AGENT WHO NEVER MET CASTELLANO, THAT ONLY A SINGLE PHOTO WAS USED TO IDENTIFY DEFENDANT-APPELLANT BY CONFIDENTIAL INFORMANTS (C.I.'S) TO THE AGENT, AND THAT THE INFORMANTS NAMES WERE NEVER GIVEN TO THE DEFENSE AND THAT THEIR RELIABILITY WAS NEVER ESTABLISHED.

Defendant-Appellant Castellano argues conversely that if his counsel was not insufficient as an advocate in not raising the issue of identification by motion that the Magistrate in Puerto Rico erred in removing Defendant-Appellant from Puerto Rico. This point is submitted on the basis that the Government failed to prove the identity of the Defendant-Appellant at the hearing on April 23, 1974 before Honorable Judge John M. Garcia, sitting in United States District Court, District of Puerto Rico, as required by Title 18 U.S.C., Rule 40 A. Id.

The pertinent facts brought out on 48 pages of transcript at said hearing are as follows:

Agent John Featherly was the only witness. He testified he had never seen or met the defendant before (Hearing P.R.-7), that he was not the arresting officer (Hearing P.R.-10), that Agent Featherly did not back up his contention that the confidential informants ("C.I.'s") testimony was reliable (Hearing P.R.-6,7). Defendant-Appellant notes that all three C.I.'s never had testified for the Government before and, therefore, their reliability had never been tested because none of their information had ever resulted in a conviction.

Agent Featherly testified that only one photo of the Defendant-Appellant was at his disposal and that it was taken after Defendant-Appellant's arrest (Hearing P.R.-17 to 19). Defendant-Appellant argues his arrest was, therefore, erroneous. He further notes that a single photo, and not a series of photos, was utilized.

Featherly testified that a single photo of the Defendant-Appellant was shown to the C.I.'s only after Defendant-Appellant's arrest, that one C.I. testified at the Grand Jury and one did not (Hearing P.R.-6,7), that the C.I. who did testify at the Grand Jury saw the photograph after he testified in the Grand Jury (Hearing P.R.-23), that both C.I.'s said the individual in the photograph had different characteristics than the person they knew (Hearing P.R.-14, 15).

Featherly testified the only reason he was able to pick out the Defendant-Appellant at the hearing was on the basis of the photograph taken after the erroneous arrest (Hearing P.R.-15).

Featherly incorrectly stated at said hearing that the reason he could not give the C.I.'s names or why they were not present at the hearing to enable Castellano to exercise his constitutionally protected right of confrontation was because their lives were in danger (Hearing P.R.-7). In actuality, they were in special Federal custody and were not in danger. These facts were brought out by counsel for different defendants at trial.

Defendant-Appellant Castellano argues that the issue of the nickname "Fu", cited throughout Defendant-Appellant's brief, was initially raised at the onset of the hearing (Hearing P.R.-5, lines 6,7), that Agent Featherly was inaccurate in stating that the C.I. knew the Defendant as Raul and Rogelio Castellano (Hearing P.R.-26,27), and that the C.I.'s called Castellano "Fu" at first (Hearing P.R.-28) because the testimony of the C.I.'s (Noa, Coronel and Arena) disputed this contention at trial (see Statement of Facts herein).

Castellano argues that the improper use of photographs by law enforcement authorities violated his constitutional rights. Specifically, only one photo was shown and not a series of photos. In Simmons v. United States (1968) 390 U.S. 377, 88 S.Ct. 967, 19 L. F.2d 1247, the Supreme Court held that each case where photographs were utilized to identify a defendant must be viewed on its own merits, and that an accused's claim that the circumstances of police identification procedure should be viewed in the light of the totality of circumstances. Simmons v. United States, Id. at 1252, 1253. Defendant-Appellant prays that this Court review the totality of the circumstances of this case as argued before and in particular, of this hearing. It is argued that the aforementioned facts at the hearing necessitate the reversal of this case and/or remand for a hearing on identification.

The Government failed to supply the requested information as to the C.I.'s identities at the hearing below. Said failure

should result in reversible error. In United States v. Rosario, 327 F.2d 561 (2nd Cir. 1964), Justice Lumbard stated that the government had a "duty to produce the informer if able to do so" and

> ...where the reliability of the informer's information is essential to establish probable cause, the government must give the information or suffer the consequence. United States v. Robinson, 325 F.2d 391 (2nd Cir. 1963).

Defendant-Appellant further contends that the test set up in United States v. Roviero, 353 US 53, 77 S.Ct. 623, 1 L.F2d 638 (1957), required the furnishing of informants' names and information at the pre-trial hearing, Id. at page 61, and that the rule in this Circuit is:

> that disclosure would be required only where independant evidence was so unsubstantial that in essence "the existance depends solely on the reliability of the informer..." United States v. Flgisser, supra. 334 F.2d. 103. See United States ex. rel. Cofkey v. Fay, supra. 344 F.2d at 633-637; also People v. Malinsky, 15 NY 2d 86, 93-94, 212 NYS 2d 65, 72-73...that disclosure is compulsory whenever the informants' communications are "essential to the establishment of probable cause..." United States v. Flgisser, supra., 334 F.2d at 110.

Defendant-Appellant argues that this is a case where the prejudice is "sufficiently objectionable" United States v. Stinson, 422 F.2d 356 (9th Cir.1969) at 358.

Defendant-Appellant argues his arrest in Puerto Rico was illegal and that the proof adduced by the prosecution on the hearing in Puerto Rico was inadequate for failure to produce the

informants and/or supply their names and sources of information. He relies in part on United States v. Robinson, 375 F.2d 391 (2nd Cir. 1963). The court in that case stated, at page 394:

> Usually the government is able to secure additonal corroborating information so that the arrest may be supported by that other evidence, and in such cases, of course, the arrest should be sustained without requiring the disclosure of the informant. However, where it is essential to the proper determination of the validity of an arrest the government must either disclose or run the risk of having the arrest held invalid.

Defendant-Appellant Castellano argues that he was innocent and was convicted because of the error at the pre-trial hearing under Rule 40 (A) Id. in Puerto Rico, and the government's activities up to and during said hearing. The government did not produce any witnesses who could properly identify him. He was, therefore, effectively denied his constitutionally protected right of confrontation. The government improperly arrested him and thereafter relied on a photograph they obtained from said questionable arrest. The government improperly showed but one photograph to their allegedly competent informants who had never testified before at trial, and whose reliability was certainly questionable, at best were but a group of convicted felons. Defendant-Appellant can fathom no reason how the faulty finding of his identity in the hearing below may be upheld.

CONCLUSION

For all the aforementioned reasons, a new trial should be granted for both Appellants, and/or, in the alternative, an identification hearing be ordered for Defendant-Appellant Castellano.

Respectfully submitted,

STUART R. SHAW, ESQ.
600 Madison Avenue
New York, New York 10022

ALAN L. HIRSHMAN
Office & P.O. Address
32 Court Street
Brooklyn, New York 11201

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

RAUL CASTELLANO and
GILBERT FERNANDEZ,

Appellants.

----------x

74 2573

INDEX TO RECORD ON APPEAL

in a conspiracy from the first day of January, 1968 until the 31st day of

D. C. Form No. 100
CRIMINAL DOCKET

74 CR 48

MISHLER, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	for deft: Amado Lopez
vs.	Stuart Shaw
MARIO BUENO, JOSE MENDEZ aka "Pepe"	233 Broadway, NYC. 10007
TEODORO CACERES aka "Teo", RAUL ORTEGA	Suite 3303
LUIS CALABRESE aka "Luisito"	CASTELLANO- Nicolas Nogueras
DOMINGO COCA, VICENTE ORTIZ aka "Cusi	c/N.Y. Hilton, room 639 N.Y.
RAUL CASTELLANO, DINO ROMANO aka "Luis Be	
GILBERTO FERNANDEZ aka "Toy Toy"	
RAUL FERNANDEZ, ~~JOHN DOE aka Chino Cha~~	
ROGELIO FERNANDEZ, ~~JOHN DOE aka Fillo~~	
conspire, ROBERTO DIAZ JIMINEZ aka "El Gaujiro"	
ort heroin, AMADO LOPEZ, ~~JOSE MASEO~~	

ABSTRACT OF COSTS	AMOUNT		CASH RECEIPTS				
			DATE	NAME	RECEIVED		DISBURSED	
Fine,	11/22/74		11/22/74	Notice of appeal (CASTELLANO) (NO FEE)				
Clerk,			11-26-74	Notice of Appeal (GILBERTO FERNANDEZ) no fee.				
Marshal,								
Attorney,								
Commissioner's Court,								
Witnesses,								

DATE	PROCEEDINGS
1-23-74	Before JUDD, J - Indictment filed ordered sealed by the Court - Bench Warrants Ordered for all defts.
2-5-74	Bench warrants issued for all defts
2-22-74	By MISHLER, CH J - Order filed that the above indictment be opened by the Clerk of the Court for the limited purposes of reproducing as many copies of the indictment as are necessary for extradition proceedings and further Ordered that after the above reproduction is completed the indictment be resealed, etc.
2-27-74	Bench warrant, copy of indictment, Affidavit of Bernard Fried, Affidavit filed and sealed
3-12-74	Before MISHLER, CH J - case called - defts BUENO & GILBERTO FERNANDEZ produced in court on a Bench Warrant - Interpreter Margarita Mensa present - Indictment ordered unsealed - defts.

4. The indictment charges that the seventeen defendants engaged

in a conspiracy from the first day of January, 1968 until the 31st day of

attached hereto as defendant's Exhibit A. Defense counsel, in an attempt to

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DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
	arraigned - court advised both defts of their rights and ~~each~~ enters a plea of not guilty on their behalf. deft GILBERTO FERNANDEZ bail set at $150,000 surety bond - court appointed counsel for deft BUENO and bail set at $10,000 surety company bond.		
3-12-74	Bench Warrants retd and filed - Executed as to defts. MARIO BUENO and GILBERTO FERNANDEZ. Bench Warrant retd and filed unexecuted as to deft VICENTE ORTIZ. (reported out of country)		
3-13-74	Before MISHLER, CH J - case called - deft BUENO present without counsel - Interpreter Margarita Mensa present - on motion of AUSA Fried bail is modified to $10,000 P/R Bond.		
3-14-74	By MISHLER, CH J - Order apptg counsel filed for deft MARIO BUENO.		
3-18-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed (Lopez)		
3-18-74	By MISHLER, CH J - Writ Issued, (Amado LOPEZ)		
3-19-74	Notice of Appearance filed (FERNANDEZ)		
3-19-74	Affidavit of BERNARD J. FRIED filed (re Vincente Ortiz)		
~~3-19-74~~	~~Affidavit of BERNARD J. FRIED filed (re defts Bonetti & Candoli)~~		
3-19-74	Before MISHLER, CH J - Case called - deft FILLO aka John Doe present without counsel - Interpreter Libya Clancy present - deft arraigned and the Court enters a plea of not guilty on defts behalf - court to appoint counsel - Bail set at $10,000 P/R Bond.		
3020-74	Before MISHLER, CH J -Case called - motion by deft Gilberto Fernandez for reduction of bail argued - bail modified to $2,500 cash deposit and wife of deft to sign a surety bond for $150,000 upon proof that the Morgage and Liens on defts home are not in excess of $18,000.		
3-20-74	By CATOGGIO, MAG.- Order for acceptance of cash bail filed (GILBERTO FERNANDEZ)		
3-20-74	By MISHLER, CH.J.- Order appointing counsel filed (JUAN PEREZ a/k/a Fil		
3-21-74	Before MISHLER, C H.J.- Case called- Deft Ortega and counsel present- Liby Clancy present as interpreter- Deft arraigned and enters a plea of not gu and not guilty by reason of double jeopardy and collateral estoppel-Bail at $50,000 P/R bond with wife to sign as surety and also the bail condi that were set in the Southern District of New York		
3-21-74	Bench warrant retd and filed- executed		
3-21-74	Notice of appearance filed- (RAUL ORTEGA)		
3-26-74	Before MISHLER, CH J - case called - deft MENDEZ & counsel Sidney Salt		

a dangerous drug. A copy of the pages of the transcript described above is attached hereto as defendant's Exhibit A. Defense counsel, in an attempt to

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DATE	PROCEEDINGS
3-26-74	Notice of Appearance filed (Jose Mendez) that the undersigned (I.Edward Pogoda, Esq., 50 Court St., Bklyn, NY. TR 5-6624-5 has been retained by the deft for the purpose of accepting service of all process in the within action on behalf of Sidney Soltz,Esq. 19 W.Flagler St. Miami,Fla.
3-[illegible]-74	Before MISHLER CH.J.- Case called- Deft and counsel present- Interprete Gerardo Sanchez present- Deft arraigned and enters a plea of not guilty (AMADO LOPEZ)
3-26-74	Notice of appearance filed (AMADO LOPEZ)
3-27-74	Three orders of removal, cash bond, and magistrates proceedings consisting of 3 appearance bonds received from Southern District of Florida and filed- (appearance bonds placed in vault)- Acknowledgment mailed for receipt of above documents (CACERES, MENDEZ AND COCA)
3-27-74	Writ retd and filed- executed (LOPEZ)
3-28-74	Magistrate's file 74 M 395 inserted into CR file.
3-28-74	Magistrate's file 74 M 420 inserted into CR file.
[illegible]-74	Before Mishler, Ch J - case called - deft COCA & counsel Martin Light present- deft arraigned and enters a plea of not guilty - Bail fixed at $50,000 P.R.Bond with wife to sign as surety and the house of deft to be security - april 19, 1974 for pre trial.
4-1-74	Notice of Appearance filed (DOMINGO COCA)
4-5-74	Before MISHLER, CH.J.- Case called- Deft CACERES and counsel present- Interpreter Libya Clancy present- Deft arraigned and enters a plea of not guilty-Bail set at $50,000 P/R Bond- with wife to sign as surety secured by property of the deft (CACERES)
4-5-74	Notice of appearance filed (CACERES)
4-5-74	By MISHLER, C H.- Order appointing counsel filed (substitution of coun for deft BUENO)
4-10-74	By Mishler, ch J - Order apptg counsel filed (Bueno) Stanley Hausen in place of Stuart Shaw,Esq.) and letter from Stuart Shaw,Esq. dated April 3, 1974 re deft Bueno for withdrawal etc.
4-19-74	**Appearance Bond filed (Coca) received from U.S.Magistrate, Southern District of Fla. (placed in vault # 61317)**
4-19-74	Letter from Albert Carricarte, esq. to chambers filed- letter dated 4-15-74 (RE:- Teodoro Caceres)
4-19-74	**Before MISHLER, CH J - case called - Pre Trial Conference held and concluded - August 5, 1974 for trial.**

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DATE	PROCEEDINGS
4-24-74	Certificate of Engagement filed
4-26-74	Memo from Magistrate Schiffman to A.U.S.A. Fried filed re:deft Caceres and bond of deft (bond and authorization to file lien against property plac in vault)
5-2-74	Stenographers transcript dated Mar. 21, 1974 filed
5-13-74	Magistrae's file 74 M 513 inserted into CR file.
5-13-73	Magistrates proceedings received from Office of the Clerk, San Juan, Puerto Rico, filed - acknowledgment mailed for receipt of papers. 74-71 M re deft Raul Castellano.
5-15-74	Before WEINSTEIN J-Case called - deft Egan & counsel V.Herwitz present trial contd - trial contd to May 16, 1974.
5-20-74	Notice of Motion filed, ret. June 7, 1974, motion for dismissal, severanc immediate trial, Bill of Particulars and Discovery.
5-20-74	Notice of Appearance filed (Amado Lopez)
[illegible]	[illegible]
5- 31-74	Before MISHLER, CH.J.- Case called- Deft CASTELLANO and counsel Mr. Nogueros present- Interpreter Margarita Mensa present- Deft arraigned and enters a plea of not guilty- Bail set at $25,000 surety bond or P.R. Bond with case deposit of $2,5000.00- Trial set for 8-5-74(CASTELLANO)
5-31-74	Notice of appearance filed(CASTELLANO)
6-5-74	By Catoggio, Mag. Order for acceptance of cash bail filed (Raul Castella
6-6-74	Letter of June 5, 1974 filed re Bill of Particulars (Lopez)
6/7/74	Before MISHLER, CH.J.- Case called- Motion for dismissal of indictment adjd to 6/21/74 on consent
6-21-74	Notice of Motion filed, ret. July 12, 1974 (Raul Ortega) for dismissal of the Indictment, ordering evidentialy hearings, Discovery, Bill of Particulars, severing of the trial as to deft Ortega, etc.
6-21-74	Before MISHLER, CH.J.- Case called- Motionmfor discovery argued- Motion granted and denied in part as indicated on the record (AMADO LOPEZ)
6-26-74	Affidavit of BERNARD J. FRIED filed.
7/1/74	Petition for Writ of Habeas Corpus Ad Testificandum filed (A. Lopez)
7/1/74	By MISHLER, CH.J. - Writ issued, ret. 7/3/74
7-3-74	Writ retd and filed - executed (LOPEZ)

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DATE	PROCEEDINGS
	(See order on back of motion papers) So Ordered
7-30-74	Petition for Writ of Habeas Corpus Ad Prosequendum filed(Mendez)
7-30-74	By Mishler, Ch J -Writ Issued, ret 8-5-74 (Mendez)
7-31-74	Notice of motion to dismiss for deft GILBERTO FERNANDEZ filed- ret.8-5-74
8-2-74	Letter to chambers from Stuart Shaw, esq. dated 8-1-74 filed re; deft Amado Lopez
8-[redacted]-74	Affirmation of Stuart Shaw, esq. filed
8-2-74	By MISHLER, CH.J.- Order of 8-2-74 and affidavit sealed by court filed and
8-5-74	Before MISHLER, CH J -case called - defts CACERES, COCO, CASTELLANO G. FERNANDEZ & LOPEZ present with counsels - defts MENDEZ not present - counsel present - case reset for trial on 8-19-74.
8-5-74	Before MISHLER, CH J - case called - motion to dismiss indictment denial of due process to be argued at the end of the trial (GILBERTO FERNANDEZ)
8-6-74	74 M 808 inserted in criminal foled (Raul Castellano)
8-12-74	Transcript of Removal Hearing filed received from U.S. District Court, San Juan, Puerto Rico(re deft Raul Castellano)
[redacted]-74	Deft Gilberto Fernandez requests that following questions be included in the Voir Dire: (see paper as indicated) forwarded to Chambers. (submitted by Alan Hirshman, counsel for the deft)
8-19-74	Before MISHLER, CH J - Case called - defts & counsels present - Interpreters Emil Rodriguez, Joaquim Guma & Maria Elena Cardenas sworn as interpreters - Defts application for 2 copies of trial transcript under CJA - Granted - Order to be submitted- Trial ordered and BEGUN - Jurors selected and sworn - Trial contd to 8-20-74 .
8-20-74	Before MISHLER, CH J - case called - defts & counsels present - Trial resumed - Govts motion to reinstate Libya Clancy as interpreter - Granted - Defts Lopez's motion for production of Coronel's passport -denied - Defts motion to unseal the indictments in which the witness Coronel is named - denied - Trial contd to 8-21-74. Deft Lopez's and Fernandez's motion for discovery granted.
8-21-74	Before Mishler, Ch J - case called - defts & counsels present - trial resumed - deft Lopez's motion for mistrial denied - Trial contd to 8-22-74.

(OVER)

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DATE	PROCEEDINGS
8-22-74	Before Mishler, Ch J - Case called - hearing begun - trial resumed - Trial contd to 8-26-74 at 10:00 am.
8-26-74	Before Mishler, xxxxxxxxxxxxxx, Ch J - case called - trial resumed - trial continued 8-27-74 at 10:00 am.
8-27-74	Before MISHLER, CH J - case called - trial resumed - Deft Lopez's motion for severance -denied - Trial continued to 8-28-74.
8-27-74	Material ordered sealed by the Court and placedin vault.
8-28-74	Before MISHLER, CH J - case called - trial resumed - Deft Domingo Coca enters a plea of guilty to Superseding Information 74 CR-537 - Waiver of Indictment signed and witnessed - bail contd - trial continued to 8-29-74. Deft Lopez' motion for severance and defts Fernandez's motion for severance denied.
8-29-74	Petition for Writ of Habeas Corpus Ad Testificandum filed.
8-29-74	By MISHLER, CH J - Writ Issued, ret. 9-3-74.
8-29-74	Before MISHLER, CH.J.- Case called- Defts and counsel present- Trial re Trial contd to 8-30-74
8-30-74	Before MISHLER, CH.J.- Case called- Defts and counsel present- Trial Trial contd to 9-3-74
9-3-74	By MISHLER, CH.J.- Order filed and sealed by the court
9-3-74	Before MISHLER, CH.J.- Case called- Defts CACERES, CASTELLANO, FERNAND LOPEZ and MENDEZ present with counsel- Interpreter present- Trial resumed Trial contd to 9-4-74 at 10:00 A.M.
9-4-74	Before MISHLER,CH.J.- Case called- Defts CACERES, CASTELLANO, FERNANDE LOPEZ and MENDEZ present with counsel- Interpreters present- Trial res Motion by defts MENDEZ and CACERES for a mistrial is denied- Govt rest Motion by all defts for a directed verdict and to dismiss the indictme denied- Trial contd to 9-9-74 at 10:00 A.M.
9-6-74	Writ retd and filed- executed
9-9-74	Before Mishler, Ch J - case called - defts CACERES, CASTELLANO, FERNANDO LOPEZ & MENDEZ present with counsels - Interpreter Emil Rodriguez and Daisy Santos present - trial resumed - TRial continued to 9-10-74.
9-10-74	Before Mishler, Ch J - case called - defts CACERES, CASTELLANO, FERNAN LOPEZ & MENDEZ present with counsels - Interpreters Emil Rodriguez and Daisy Santos present - Trial resumed - Trial contd to 9-11-74.
9-10-74	By Mishler, Ch J - Order of sustenance filed (Lunch 16 persons)
9-11-74	By Mishler, Ch J - Order of sustenance filed (Lunch 16 persons)

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DATE	PROCEEDINGS
	Motion by deft Caceres for a mistrial is denied - Trial contd to 9-12-74.
9-12-74	Before MISHLER, CH.J.- Case called- Defts and counsel present- Interprete present-Trial resumed-Govt rests- All defts rest- Motion by all deft for ajudgment of acquittal argued- motion denied- Trial contd to 9-14-74 at 10:00 A.M.
9[redacted]- 74	By MISHLER, CH.J.- Order of sustenance filed
9-14-74	Before MISHLER, CH.J.- Case called- Deft and counsel present- Interprete present- Trial resumed- Trial contd to 9-16-74 at 10:00 A.M.
9-16-74	Voucher for ~~expert~~ expert services filed(CASTELLANOS)
9-14-74	By MISHLER,CH.J.- Order of sustenance filed
9/16/74	Before MISHLER, CH.J.- Case called- Defts Caceres,Castellano Fernandez,Lopez and Meddez present with counsel-Interpreter E. Rodriguez and J. Guma present-Trial resumes-At 12:15 P.M. the jury ~~retd~~ retired for deliberation-At 9:30 P.M. the jury retd and asked to continue their deliberation on 9/18/74 at 10:00 A.M.-Trial cont'd 9/18/74 .
[redacted]/74	2 Orders of Sustenance filed.
9/18/74	Voucher for Expert Services filed.
9/18/74	Letter of Stuart Shaw to Ch.J. Mishler filed
9/18/74	Before MISHLER, CH.J.- Case called- Deft Caceres.Castelbano.Fernandez. Lopez and Mendez present with counsel-Interpreter E. Rodriguez and J. Guma present-Trial resumed-At 3:15 P.M. the jury retd and rendered a verdict of guilty as to defts Castellano.Fernandez and Lopez as charged-Defts Caceres and Mendez were found not guilty and were dis-charged by the court-Sentence adjd without date-Jury polled-Jury discharged-Trial concluded-Bail set at $50.000.00 Surety Co. Bond ast to deft Castellano-Bail set at $50.000.00 with house of deft as security and $2,500.00 cash deposit as to deft Fernandez)All motions reserved to time of sentencing-Court ordered the memorandum of verdict signed by the foreman filed.
9/18/74	Memorandum of Verdict signed by the foreman filed.
9/18/74	By MISHLER, CH.J.- Order of Sustenance dated Sept. 18. 1974 filed.
9-18-74	By MISHLER, CH J - Judgment of Acquittal filed (defts.CACERES & MENDEZ)
9-19-74	Writ retd and filed- exeucted (MENDEZ)
9-23-74	Voucher for expert services filed(CASTELLANO and LOPEZ)(Interpreter)

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DATE	PROCEEDINGS
9-24-74	Two vouchers for expert services filed
9-24-74	Stenographers Transcripts dated 9-16-74 and 9-18-74 filed
10-16-74	Letter filed dated 10-15-74 from Stuart R.Shaw Esq.received from Chambers.
11-1-74	Before MISHLER, CH J - case called - defts JOHN DOE AKA Fillo, BUENO, & COCOA present with counsels - On motion of AUSA David De Petris the Indictment is dismissed as to defts #JOHN DOE aka Fillo, Bueno and Coca.
11-1-74	By MISHLER,- CH J - Order of dismissal filed as to above defts.
11/7/74	Stenographer's transcripts 9/9/74, 9/10/74, 9/11/74 , 9/12/74, 9/14/74 filed.
11/8/74	Stenographers Transcript dated 8/19/74. 8/20/74, 8/21/74, 8/22/74, 8/26/ 8/28/74, 8/29/74, 8/30/74, 9/3/74 and 9/4/74 filed
11/11/74	Motion requesting re=setting of bail filed (CASTELLANO)
11-11-74	Stenographers transcript filed dated August 27, 1974.
11/13/74	Govt's memorandum in opposition to deft's motion for dismissal(GILBERT FERNANEZ)
11/14/74	Voucher for compensation of counsel filed- (BUENO)
11/15/74	Letter from Alan Hirshman, esq. to chambers filed re:deft GILBERTO FERNANDEZ and adjournment of case
11/15/74	Before MISHLER,CH.J.- Case called- Sentence adjd to 11/22/74 at 9:30 A. as to deft GILBERTO FERNANDEZ and 11/13/74 at 4:00 P.M. as to deft CAS
11/18/74	Before MISHLER, CH,J.- Case adjd for sentencing on 11/22/74 at 9:30 A.M on consent(CASTELLANO)
11/22/74	Before MISHLER, CH.J. - Case called- Deft RAUL CASTELLANO present with Nicholas Nogueras- Motion to set aside verdict, etc. denied- Deft sente to imprisonment for a period of 7 years on count 1- court advised deft his right to appeal- clerk to file notice of appeal without fee
11/22/74	Judgment and Commitment filed- certified copies to Marshal (CASTELLANO)
11/22/74	Notice of appeal filed(CASTELLANO) (NO FEE)
11/22/74	Docket entries and duplicate of notice of appeal maile to court of appea (CASTELLANO)
11/22/74	Before MISHLER, CH.J.- Case called- Deft GILBERTO FERNANDEZ and counsel not present- Bench warrant ordered and stayed until 11/26/74 at 9:30 A.M Sentence adjd to 11/26/74 at 9:30 A.M.
11-26-74	Before MISHLER, CH J - case called - deft GILBERTO FERNANDEZ &

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DATE	PROCEEDINGS
	Deft sentenced to a term of imprisonment of 5 years. Court advised the deft of his right to appeal. Clerk to file notice of appeal without fee - Bail conditions contd pending appeal.
11-26-74	Judgment & Commitment filed - certified copies to Marshal. (GILBERTO FERNANDEZ)
11-26-74	Notice of Appeal filed without fee (GILBERTO FERNANDEZ)
11-26-74	Docket entries and duplicate of Notice of Appeal mailed to C of A with Forms A & B and affidavit of financial status (GILBERTO FERNANDEZ)
11/25/74	By MISHLER, CH.J.- Copy of order releasing bail filed (CASTELLANO)
11-26-74	By MISHLER, CH J - Memorandum of Decision and Order filed denying motion of deft Gilberto Fernandez for dismissal prior to the commencement of trial on the ground that pre-indictment delay violated defts right to due process, etc.
11/27/74	Certified copy of Judgment and Commitment retd and filed. Delivered to FDH (RAUL CASTELLANO)
12/3/74	Voucher for compensation of counsel filed (JUAN PEREZ)
12-12-74	Magistrate's file 74 M 1363 inserted into CR file.
12/20/74	Before MISHLER, CH.J.- Case called- Deft not present- Bench warrant ordered(LOPEZ)
12/20/74	Bench warrant issued
/23/74	Voucher for compensation of counsel filed (BUENO)
24/74	Ceritified copy of Judgment and Commitment retd and filed- deft delivere to U.S. Penitentiary at Lewisburg Pa. (CASTELLANO)
3/4/75	Record on appeal certified and handed to Richard Seltzer for delivery to court of appeals (CASTELLANO, FERNANDEZ)

A TRUE COPY
ATTEST
DATED 12/7/ 19 75
LEWIS ORGEL
CLERK
BY DEPUTY CLERK

D. C. 109

inspection of the Court, so that the Court may make an independent determina-

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

-against-

74 Cr. 48 (JM)

MOTIONS FOR: DISMISSAL OF INDICTMENT, SEVERANCE, IMMEDIATE TRIAL, BILL OF PARTICULARS & DISCOVERY

MARIO BUENO
TEODORO CACERES aka "Teo"
LUIS CALABRESE aka "Luisito"
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ aka "Toy Toy"
RAUL FERNANDEZ
ROGELIO FERNANDEZ
ROBERT DIAZ JIMINEZ aka "El Gaujiro"
AMADO LOPEZ
JOSE MASEO
JOSE MENDEZ aka "Pepe"
RAUL ORTEGA
VICENTE ORTIZ aka "Cusicaca"
DINO ROMANO aka "Luis Belmonte"
JOHN DOE aka "Chino Chang"
JOHN DOE aka "Fillo"

Defendants.

----------x

SIRS:

PLEASE TAKE NOTICE that, upon the annexed affirmation of STUART R. SHAW, ESQ., dated May 17, 1974, all of the proceedings heretofore had upon Docket No. 74 Cr. 48 before the Hon. J. Jacob Mischler, United States Court House, Cadman Plaza, Brooklyn, New York, on the 7th day of June 1974 at 9:30 a.m. in the forenoon of that day, or as soon thereafter as counsel can be heard, for the following pre-trial relief:

1. Dismissal of the Indictment herein upon the ground that the prosecution of the instant indictment subjects defendant to double jeopardy and double punishment in violation of the Sixth Amendment to the United States Constitution, in that the conspiracy charge of the instant indictment is, in law and in fact, the same conspiracy as that charged in Indictment No. 71 - 450 - CR-PF, upon which a judgment of conviction was entered upon the defendant on or about September, 1971; in the United States District Court for the Southern District of Florida in the case of U.S. v. Amado Lopez and Thomas Llerena before the Honorable Peter T. Fay.

2. Severance of the trial of the defendant from that of any other defendant to the extent that the circumstances of such other defendant (fugitive status or other circumstances necessitating delay) are such that the trial in the instant case is likely to be further delayed if the defendants are to be tried jointly;

3. Severance of the trial of the defendant from that of any other defendant whose statements and/or admissions are introduced in evidence at trial, but which would be violative of the exclusionary principle enunciated in Bruton v. United States, 391 U.S. 123 (1968), with respect to the defendant Lopez;

4. An Order prohibiting the United States from using in evidence the fruits of any search and seizure or electronic surveillance with regard to which the defendant Lopez has standing as an aggrieved party, and which were secured in violation of his rights under the Fourth Amendment of the United States Constitution and 18 U.S.C. §§2510, et seq.;

5. An Order prohibiting the Government from using in evidence the fruits of any interrogation or identification of the defendant secured in violation of his rights under the Sixth Amendment (right to counsel) or Fifth Amendment (self-incrimination, due process of law) of the United States Constitution;

6. An Order granting to the defendant inspection of the Grand Jury minutes with regard to Indictment No. 71-450-CR-PF in the United States District Court for the Southern District of Florida and the instant indictment, in aid of the defendant's motion for dismissal of the indictment upon the ground of double jeopardy [Federal Rules of Criminal Procedure, Rule 6(e)];

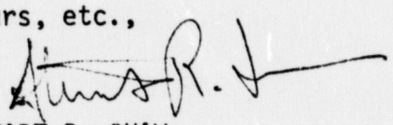
7. An Order directing that a pre-trial hearing be convened with regard to any unresolved factual issue necessary for the determination of each of the above requested items of relief;

8. Directing that the Government provide the defense with a Bill of Particulars of the Indictment, as set forth in Schedule I annexed hereto (prior to the return date of this motion, the Court will be advised as to which, if any, of the requested particulars, the Government consents to supply) [Rule 7, Federal Rules of Criminal Procedure];

9. An Order directing the Government to provide the defense with discovery and inspection, as specified in Schedule II annexed hereto (in advance of the return date of this motion, the Court will be advised as to which of the requested items of discovery and inspection the Government has consented to supply) [Rule 16, Federal Rules of Criminal Procedure and Due Process clause of the Fifth Amendment to the United States Constitution].

Dated: New York, New York
April 23, 1974

Yours, etc.,



STUART R. SHAW
Attorney for Defendant Amado Lopez
233 Broadway, Suite 3303
New York, New York 10007
(212) 233-8991

TO: Clerk
United States District Court
Eastern District of New York

Edward J. Boyd
United States Attorney
Eastern District of New York
Attn:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

74 Cr. 48 (JM)

AFFIRMATION

MARIO BUENO
TEODORO CACERES aka "Teo"
LUIS CALABRESE aka "Luisito"
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ aka "Toy Toy"
RAUL FERNANDEZ
ROGELIO FERNANDEZ
ROBERT DIAZ JIMINEZ aka "El Gaujiro"
AMADO LOPEZ
JOSE MASEO
JOSE MENDEZ aka "Pepe"
RAUL ORTEGA
VICENTE ORTIZ aka "Cusicaca"
DINO ROMANO aka "Luis Belmonte"
JOHN DOE aka "Chino Chang"
JOHN DOE aka "Fillo"

Defendants.

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STUART R. SHAW, an attorney admitted to practice in the Courts of the State of New York, affirms the following to be true under penalty of perjury, pursuant to Rule 2106 CPLR:

1. I am the attorney for the defendant herein, AMADO LOPEZ, and I make this affirmation in support of the defendant's motions for pre-trial relief, to wit:

A. Dismissal of the Indictment upon the ground of double jeopardy;

B. Dismissal of the Indictment upon the ground that a speedy trial has not been afforded to the defendant, nor has he been afforded his right to a prompt disposition of the criminal charges against him;

C. Separate trial from that of certain co-defendants;

D. Suppression of evidence obtained by means of illegal search and seizure and electronic surveillance;

E. Suppression of evidence secured by means of illegal interroga-

F. Inspection of the Grand Jury minutes leading to this indictment and indictment 72 Cr. 628;

G. Pre-trial hearings with regard to the above-requested items of relief;

H. Bill of Particulars of the indictment;

I. Discovery and Inspection.

2. AMADO LOPEZ (hereinafter referred to as the defendant) has been named as one of seventeen defendants in a one-count indictment in the United States District Court for the Eastern District of New York. On January 23, 1974 the indictment was sealed under the order of the Hon. J. Orrin Judd. On March 12, 1974 the case was called and two of the defendants were produced in Court.

3. The indictment charges that the seventeen defendants conspired to import and bring into the United States large quantities of heroin, and unlawfully would receive, conceal, buy, sell and facilitate the transportation, concealment and sale of large quantities of heroin, and that the defendants and co-conspirators would conceal the existence of the conspiracy. The indictment states that the conspiracy took place on or about and between the first day of January, 1968 and the 31st day of December, 1970. The defendant, AMADO LOPEZ, was indicted on July 23, 1971 on a three count indictment under Case No. 71-450-CR-PF in the United States District Court in and for the Southern District of Florida. The defendant was arraigned on August 3, 1971 on the charge and the trial commenced on August 25, 1971. The defendant was found guilty and was sentenced on all three counts of the indictment. The defendant was convicted on count one of the indictment for conspiracy to possess with intent to distribute cocaine. The defendant was convicted and sentenced on count two of the indictment for distributing cocaine. The defendant was convicted and sentenced on count three of the indictment for distributing heroin. The defendant was sentenced to imprisonment as to count one and count two for seven years, and as to count three for three years, said sentences to run concurrently.

4. The indictment charges that the seventeen defendants engaged in a conspiracy from the first day of January, 1968 until the 31st day of December, 1970. The indictment charges the defendants with a violation of Sections 173 and 174 of Title 21 of the United States Code. Upon the effective date of the new statutes the former statutes (21 U.S.C., Sections 173 and 174) were repealed. Since the conspiracy in this case allegedly existed prior to May 1, 1971 the indictment alleges that the defendants violated or conspired to violate the now repealed statutes. It should be noted that the indictment under which the defendant was tried and found guilty in the United States District Court for the Southern District of Florida charged the defendant with violating the statutes which came into effect upon May 1, 1971. However, as previously noted, the new statutes supplant the old statutes, and in effect, indicate the same law.

5. The conspiracy under which the defendant was convicted during the prior prosecution in Florida allegedly took place in the year 1971. Said fact would ordinarily prevent this defendant from raising the defense of double jeopardy. However, the prosecution, the United States Attorney's Office for the Southern District, utilized evidence in the defendant's trial in the Southern District of Florida to convict the defendant that was based on an alleged sale of narcotic drugs in October of 1970. Said date, October of 1970, would fall within the purview of the allegations made in the instant indictment. Specifically, the government adduced this information in regard to a sale of narcotic drugs over the objection of defense counsel on the direct testimony of one LAZO, a witness called by the prosecution. Said testimony of the prosecution witness, CARLOS BANOS LAZO, begins at page 293 of the trial transcript of the defendant AMADO LOPEZ' case in the United States District Court for the Southern District of Florida. On direct examination by Mr. Keefe, the Assistant United States Attorney, starting at page 295, and continuing until page 297, the facts were presented before the jury that the defendant herein, AMADO LOPEZ, had sold

a dangerous drug. A copy of the pages of the transcript described above is attached hereto as defendant's Exhibit A. Defense counsel, in an attempt to dispel from the jury's mind the testimony given in regard to the alleged transfer and sale of a narcotic drug by AMADO LOPEZ attempted on cross-examination to question the witness LAZO's testimony. Defense counsel specifically questioned the witness LAZO at page 309 of said transcript, a copy of which is attached hereto as defendant's Exhibit B, and continued to cross-examine LAZO in regard to his previous record. The witness' previous record included convictions in regard to sale and distribution of heroin. The jury heard all of the testimony in regard to the alleged sale of a dangerous drug on October, 1970, and of the fact that the witness LAZO had been convicted in the past for heroin. (The examination of the witness LAZO goes on for many pages - however, defense counsel will make all of those pages available if requested.)

6. It is the defendant's contention that because of the fact that the trial judge in the Southern District of Florida permitted testimony in regard to a transfer and sale of dangerous drugs in October of 1970 and because of the fact that the jury presumably utilized said testimony in making their final determination and bringing in a verdict of guilty against the defendant LOPEZ, that a trial in the Eastern District in New York for violation of Federal Statutes for conspiracy to possess and distribute heroin would result in double jeopardy to the defendant AMADO LOPEZ. It is therefore argued that the case against defendant AMADO LOPEZ should be dismissed in the interest of justice.

7. Both the indictment in the Southern District of Florida and the instant indictment name AMADO LOPEZ as a conspirator and defendant. It is true that other defendants and conspirators are named in both indictments and that none of these other named individuals appear in both indictments. Nevertheless, it only takes two to make a conspiracy. We thus have an identical conspirator in both indictments.

8. The conspiracy count of the first indictment charges a conspiracy for possession with intent to distribute a narcotic drug controlled substances. In fact, the substances involved are cocaine and heroin. In the second indictment (the instant indictment) the controlled substance described is heroin. We therefore have an identical controlled substance, Heroin, in each case.

9. An Order prohibiting the United States from using in evidence the fruits of any search and seizure or electronic surveillance with regard to which the defendant Lopez has standing as an aggrieved party, and which were secured in violation of his rights under the Fourth Amendment of the United States Constitution and 18 U.S.C. §§2410, et seq.;

10. An Order prohibiting the Government from using in evidence the fruits of any interrogation or identification of the defendant secured in violation of his rights under the Sixth Amendment (right to counsel) or Fifth Amendment (self-incrimination, due process of law) of the United States Constitution;

11. An Order granting to the defednant inspection of the Grand Jury minutes with regard to Indictment No. 71 - 450-CR-PF in the United States District Court for theSouthern District of Florida and the instant indictment, in aid of the defendant's motion for dismissal of the indictment upon the ground of double jeopardy [Federal Rules of Criminal Procedure, Rule 6 (e)];

12. An Order directing that a pre-trial hearing be convened with regard to any unresolved factual issue necessary for the determination of each of the above requested items of relief;

13. Directing that the Government provide the defense with a Bill of Particulars of the Indictment, as set forth in Schedule L annexed hereto (prior to the return date of this motion, the Court will be advised as to which, if any, of the requested particulars, the Government consents to supply) [Rule 7, Federal Rules of Criminal Procedure];

14. An Order directing the Government to provide the defense with discovery and inspection, as specified in Schedule II annexed hereto (in advance of the return date of this motion, the Court will be advised as to which of the requested items of discovery and inspection the Government has consented to supply) [Rule 16, Federal Rules of Criminal Procedure and Due Process clause of the Fifth Amendment to the United States Constitution].

WHEREFORE, counsel respectfully requests that the Court grant the relief requested in this affirmation and such other and further relief as the Court deems necessary and in the interest of justice to his client AMADO LOPEZ.

Dated: New York, New York
May 17, 1974

Duly affirmed,

_____
Stuart R. Shaw

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

MARIO BUENO
TEODOR CACERES aka "Teo"
LUIS CALABRESE aka "Luisito"
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ aka "Toy Toy"
RAUL FERNANDEZ
ROGELIO FERNANDEZ
ROBERT DIAZ JIMINEZ aka "El Gaujiro"
AMADO LOPEZ
JOSE MASEO
JOSE MENDEZ aka "Pepe"
RAUL ORTEGA
VICENTE ORTIZ aka "Cusicaca"
DINO ROMANO aka "Luis Belmonte"
JOHN DOE aka "Chino Chang"
JOHN DOE aka "Fillo"

Defendants.

----------x

74 Cr. 48 (JM)

SCHEDULE I - REQUEST FOR BILL OF PARTICULARS

1. Paragraph 1 of the indictment identifies certain of the defendants only by reference to pseudonyms and aliases. Provide the defense with the names and addresses of each such defendant. Provide the defense with the names and addresses of any and all co-conspirators unindicted or indicted in the future or named on the indictment in the future, whichever the case may be.

2. Paragraph 1 and subparagraph 1 of the indictment alleges that the defendants "did combine, conspire, confederate and agree together to violate Sections 173 and 174 of Title 21 of the United States Code". . . Subparagraph 1 goes on to quote "It was part of said conspiracy that the defendants and co-conspirators fraudulently and knowingly would import and bring into the United States large quantities of heroin, a narcotic drug, contrary to law. Specify:

(a) The name or names of the countries that the narcotics were allegedly imported from;

(b) The quantity of each such narcotic drug (heroin);

(c) Whether the objective of the conspiracy was a single

importation or multiple importation of heroin and as to each such importation advise the defense as to whether the importation was in fact accomplished;

(d) As to each importation which was, in fact, accomplished, provide the defense with the date, time, place, circumstances, quantity, nature of drug, and individuals directly involved.

3. Subparagraph 2 of the indictment charges that the defendants conspired to " . . . receive, conceal, buy, sell and facilitate the transportation, concealment, and sale of large quantities of heroin . . ." Specify:

(a) The quantity of heroin involved;

(b) To the extent that this aspect of the conspiracy was, in fact, accomplished, in whole or in part, then specify the date, time, place, individuals directly involved, quantity and name of drug involved, and circumstances of each such transaction.

4. Subparagraph 3 of the indictment alleges that the defendants conspired to "conceal the existence of the conspiracy and would take steps designed to prevent disclosure of their activities. . ." Specify:

(a) The steps taken by each and every defendant and/or co-conspirator to prevent disclosure of the activities and/or conceal the existence of the conspiracy;

(b) The dates, times and places of the above-requested acts.

5. With regard to overt acts 1, 2, 3 and 16 specify the date and time of departure and arrival, the point of departure, the specific destination and the means of transportation (e.g., if by air the airline and flight number, etc.) of the events alleged therein.

6. With regard to overt acts 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 specify the date, time and exact place of delivery.

7. With regard to overt acts 11 and 15 specify the dates and times of departure and arrival, the point of departure, the specific destination, means of transportation, a description of the money involved (i.e., check, currency, denominations or otherwise) and the purpose of the act.

8. With regard to overt acts 1, 2, 3 and 16 specify the purpose of the act.

9. With regard to overt acts 3 and 6 specify dates, times, places of departure and arrival, describe whether or not any money changed hands, describe whoever else was present, describe the purpose of the act.

10. Specify all other overt acts known to the Government, but not alleged in the indictment, which the Government intends to prove at trial, and set forth in detail the dates, times, places and persons present with regard to each such act.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

-against-

MARIO BUENO
TEODORO CACERES aka "Teo"
LUIS CALABRESE aka "Luisito"
DOMINGO COCA
RAUL CASTELLANO
GILBERTO FERNANDEZ aka "Toy Toy"
RAUL FERNANDEZ
ROGELIO FERNANDEZ
ROBERT DIAZ JIMINEZ aka "El Gaujiro"
AMADO LOPEZ
JOSE MASEO
JOSE MENDEZ aka "Pepe"
RAUL ORTEGA
VICENTE ORTIZ aka "Cusicaca"
DINO ROMANO aka "Luis Belmonte"
JOHN DOE aka "Chino Chang"
JOHN DOE aka "Fillo"

Defendants.
----------x

74 Cr. 48 (JM)

SCHEDULE II - REQUEST FOR DISCOVERY AND INSPECTION

I. Electronic Surveillance

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure; the search and seizure provisions of the Fourth Amendment; the due process and self-incrimination clauses of the Fifth Amendment; and 18 U.S.C. §§ 2510-2520, the defendant moves the Court for an Order:

A. Directing the United States Government, through the United States Attorney, to conduct a thorough investigation and to advise the defendant whether he, or premises under his ownership, direction or control, have been the subject or target of electronic surveillance at the direction or instigation of any agency or operative of the Government.

B. Granting to the defendant discovery and inspection of all Court orders, recording tapes, notes, logs and transcripts with regard to any electronic surveillance disclosed under subsection A, supra.

C. Directing that, to the extent the disclosure requested under subsection "B" is not granted, that all such materials be produced for the

inspection of the Court, so that the Court may make an independent determination as to whether such materials should be provided to the defense.

D. Directing that all such existing electronic surveillance material which is not disclosed to the defense be marked, sealed, and kept in safekeeping by the Clerk of this Court for the purpose of further review.

II. Search and Seizure

Pursuant to Rules 16 and 41(e) of the Federal Rules of Criminal Procedure, the search and seizure provision of the Fourth Amendment, and the Due Process and Self Incrimination provisions of the Fifth Amendment, the defendant moves the Court for an Order:

A. Directing that the prosecution advise the defendant as to whether the Government or anyone under its control or at its direction or instigation, searched for and/or seized from the defendant or from property under his ownership, direction or control, any document or tangible object, as well as the circumstances of such search and seizure.

B. Directing that the prosecution provide the defense with an opportunity to copy and inspect any materials which were seized from the defendant as described in subsection "A", supra.

III. Discovery and Inspection

Pursuant to Rule 16 of the Federal Rules of Criminal Procedure and the due process clause of the Fifth Amendment, the defendant requests discovery and inspection, including permission to copy or photograph, as follows:

A. Statements of Defendant - any alleged statements, admissions, or confessions, including, statements (1) in writing, or (2) since reduced to writing, or (3) otherwise preserved, regardless of whether such statement was obtained with the knowledge and consent of the defendant.

B. Statements of Co-defendants - all statements, admissions or confessions made by any co-defendant, whether reduced to writing or not, which tend to incriminate the defendant, in the possession of the Government or

otherwise known to the Government, and which the Government intends to use at a joint trial of the defendant and the co-defendants.

IV. Scientific Tests and Reports

All results and reports of any scientific tests or experiments made in connection with this case are hereby requested by the defendant.

V. Identification

The Government is requested to advise the defendant as to whether it intends to offer in evidence against him the fruits of any eye-witness or voice identification. If so, provide the defense with: 1) the date, place, time and type of each such identification; and 2) the name or names of the person or persons who made each such identification and of other persons who were present at each such identification.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

Plaintiff,

-against-

GILBERTO FERNANDEZ,

Defendant.

- X

NOTICE OF MOTION TO DISMISS INDICTMENT DENIAL OF DUE PROCESS

DOCKET NO. 74 CR 48

S I R :

PLEASE TAKE NOTICE, that upon the indictment herein, the annexed affidavit of ALAN L. HIRSHMAN, sworn to the 29th day of ~~April~~ July, 1974 and all the proceedings had herein, an application will be made by the defendant at a stated term of the United States District Court of the Eastern District of New York, for the hearing of Criminal Motions, to be held at the United States Courthouse, ~~Foley Square~~, on the 5th day of AUGUST 1974, BEFORE HON. JUDGE MISHLER at the opening of Court on that day, or as soon thereafter as Counsel can be heard, for an order quashing the indictment and each and every count thereof, upon the grounds that:

1. Said indictment is a denial of due process because defendant is unable to defend himself, where complaint was not sworn out until three years after alleged offenses.

2. Delay in swearing out the complaint is oppressive, purposeful and works prejudice against the defendant.

3. Pre-indictment delay is denial of due process because defendant is unable to recall events of days in the alleged offenses. A witness' memory has been so impaired by the delay

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4. Prejudice must be presumed where pre-indictment delay is a minimum of three years and without a showing of "police enforcement necessity."

5. Prejudice must be presumed also where defendant has no recollection of the days in question, other than possibly being in another city on or about the days in question which may have included the days of the alleged offenses.

6. Prejudice must be presumed because no man can be expected to remember events which occur that far back.

7. Prejudice must be presumed where prosecution's case will undoubtedly consist of testimony from informers and from Narcotic Bureau Agents and their use of notebooks as memory refreshing items.

Dated: Brooklyn, New York,

April , 1974.

Yours, etc.,

ALAN L. HIRSHMAN
Attorney for Defendant
Office & P. O. Address
32 Court Street
Brooklyn, New York 11201
ULster 5-5066

TO: HON. EDWARD J. BOYD V
United States Attorney
Eastern District of New York

CLERK OF THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

-against-

GILBERTO FERNANDEZ,

Defendant.

- X

DOCKET NO. 74 CR 48

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS INDICTMENT - DENIAL OF DUE PROCESS

STATE OF NEW YORK : COUNTY OF KINGS) SS.:

ALAN L. HIRSHMAN, being duly sworn, deposes and says:

I am the attorney for the defendant, GILBERTO

FERNANDEZ, and am familiar with the facts and circumstances relative to the indictment herein.

The Grand Jury returned an indictment against GILBERTO FERNANDEZ charging him with the crime of violating Ti 21, United States Code, Sections 173 and 174.

The crimes alleged occurred a minimum of three years before any complaint, arrest or indictment was handed do from the Grand Jury. All the evidence had been gathered some time before the indictment causing prejudice to effective defe and denial of Due Process by means of pre-indictment delay.

That no previous application has been made for the relief sought herein.

WHEREFORE, I respectfully ask that an Order be made herein dismissing the indictment.

ALAN L. HIRSHMAN

Sworn to before me this
29 day of April, 1974.

ERNEST CHAPIRO

FIRST NATIONAL CITY BANK

Nº s 92542

CARACAS BRANCH

CARACAS, VENEZUELA MAY 11 19 65

PAY AGAINST THIS CHECK U. S. $ 777.78

TO ESPERANZA VERGARA OR ORDER

THE SUM OF SEVEN HUNDRED SEVENTY SEVEN & 78/100

777.78

TO **FIRST NATIONAL CITY BANK**
399 PARK AVENUE
NEW YORK 22, N. Y. U.S.A.

COPIA
NO NEGOCIABLE

AUDITOR'S STUB 4.50

AMOUNT U. S. $ 777.78

RATE

TOTAL LOC. CY. 3.500.00

CARACAS, VENEZUELA

Queda entendido que el Banco no asume ninguna responsabilidad por inconvenientes que emanen de causas que estén fuera de su dominio y que el valor citado será pagado a los beneficiarios, al tipo de compra de sus corresponsales el día de pago, en la moneda del país del destino.

U. S. DOLLARS – HEAD OFFICE

FIRST NATIONAL CITY BANK

Nº s 92541

CARACAS BRANCH

CARACAS, VENEZUELA MAY 11 19 65

PAY AGAINST THIS CHECK U. S. $ 5.350.56

TO ESPERANZA VERGARA OR ORDER

THE SUM OF FIVE THOUSAND THREE HUNDRED FIFTY & 56/100

5350.56

TO **FIRST NATIONAL CITY BANK**
399 PARK AVENUE
NEW YORK 22, N. Y. U.S.A.

COPIA
NO NEGOCIABLE

AUDITOR'S STUB 4.50

AMOUNT U. S. $ 5.350.56

RATE

TOTAL LOC. CY. 24.077.50

CARACAS, VENEZUELA

Queda entendido que el Banco no asume ninguna responsabilidad por inconvenientes que emanen de causas que estén fuera de su dominio y que el valor citado será pagado a los beneficiarios, al tipo de compra de sus corresponsales el día de pago, en la moneda del país del destino.

U. S. DOLLARS – HEAD OFFICE

FOD 178 - REV. 1-62

TC. 306504-14.000

DEFENDANTS EXHIBIT CC